

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION**

**HAZEL M. ROBY, as Administratrix of
the Estate of RONALD TYRONE
ROBY, Deceased,**

Plaintiff,

v.

BENTON EXPRESS, INC., et al,

Defendants.

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CIVIL ACTION NO.: 2:05CV494-T

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE

COMES NOW the Defendant, Benton Express, Inc., and, in response to Plaintiff's Motion to Strike (Doc. No. 33), states as follows:

1. In her Motion to Strike, the Plaintiff has moved the Court to strike all evidentiary submissions offered in support of Defendant's Motion for Partial Dismissal (Doc. No. 27). Although the Plaintiff does not specifically so state, presumably the "evidentiary submissions" the Plaintiff seeks to have stricken consist of "Defendant's First Rule 26(a)(2) Disclosures" which were filed as Exhibit 1 to Defendant's Motion for Partial Dismissal and which contain the opinions of Defendant's trucking industry expert, Bob Tynes.

2. There is no basis to strike Mr. Tynes' opinions from the Court's consideration. Where matters outside the pleadings are offered in a Rule 12(b)(6) motion, it may be considered by the Court as would a motion for summary judgment. In fact, Defendant has incorporated the Motion for Partial Dismissal and the opinions of Bob Tynes into its Motion for Summary Judgment (Doc. No. 34). All evidence, including the opinions of Mr. Tynes, can be considered by the Court when it is deciding the Motion for Summary Judgment.

3. In the event the Court elects to strike the opinions of Mr. Tynes from the Motion for Partial Dismissal, the Motion for Partial Dismissal still is due to be granted. Defendant has demonstrated, and the Plaintiff has failed to rebut, that there is no legal duty to support the claims the Plaintiff attempts to state in Count Three of her First Amended Complaint. Therefore, Count Three of the First Amended Complaint is due to be dismissed for failure to state a claim upon which relief can be granted.

WHEREFORE, PREMISES CONSIDERED, Defendant Benton Express respectfully requests the Court to enter an Order denying the Plaintiff's Motion to Strike.

Respectfully submitted,

s/ Gregory A. Brockwell
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following on this the 28th day of November, 2005:

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